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No. 534

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

On Appeal from the Supreme Court of Ohio

S. S. KRESGE CO.,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

MOTION TO DISMISS OR AFFIRM AND STATEMENT OPPOSING JURISDICTION

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Supreme Court of the United States

No. 534

S. S. KRESGE CO.,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee in the above-styled cause, pursuant to Rule 16 (1) (b) of the Revised Rules of the Supreme Court of the United States, moves the appeal be dismissed on the ground that it does not present a substantial federal question; or in the alternative in support of appellee's motion to dismiss or affirm, respectfully states the following:

Supreme Court of the United States

No. 534

S. S. KRESGE CO.,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

MOTION TO DISMISS OR AFFIRM.

For the foregoing reasons and based upon the foregoing facts and authorities, this appellee moves that the Court dismiss the appeal of this appellant or affirm the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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JOSEPH D. KARAM,
ROBERT J. KOSYDAR,
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State House Annex, Columbus 15, Ohio,
Attorneys for Appellee.

STATEMENT OPPOSING JURISDICTION

The appellee in the above entitled cause, for its statement in opposition to appellant's statement as to jurisdiction herein and in support of appellee's motion to dismiss or affirm, respectfully states the following:

I.

STATEMENT OF THE CASE AND FACTS

The appellant is seeking a review of a unanimous decision of the Ohio Supreme Court rendered on March 23, 1960, whereby such Court affirmed a decision of the Ohio Board of Tax Appeals and upheld a sales tax assessment made by the Tax Commissioner of Ohio, Stanley J. Bowers, appellee herein.

This matter originated on February 24, 1958, when the Tax Commissioner of Ohio issued a sales tax assessment against the appellant. The period of the assessment was January 1, 1952 to December 31, 1955 and the total assessment amounted to $396,579.41. The statutory 15% penalty was conditionally remitted by the Tax Commissioner.

The sales tax assessment resulted from the finding by the Tax Commissioner of Ohio that the appellant did not have adequate records as required by Section 5739.11, Ohio Revised Code to support the semi-annual returns of sales tax which it had been filing. By the provisions of Section 5739.10, Ohio Revised Code, the Tax Commissioner of Ohio is granted authority to conduct test checks of a taxpayer's business to ascertain the correct amount of sales tax which should have been paid. Acting under such authority, the Tax Commissioner of Ohio conducted test checks in 36 of the appellant's five and ten cent variety stores during the months of March, April and May of 1956. Although the appellant operates 83 stores in Ohio

test checks were conducted in only 36 and the results of these test checks were applied only to these 36 stores in arriving at the assessment in issue.

Each of the test checks were conducted over a period of six (6) consecutive days. *In compliance with the requests of S. S. Kresge*, through its counsel:

1. The test checks were conducted only at such times as would eliminate the great seasonal sales peaks which occurred during Easter, St. Valentine's Day, Memorial Day, early summer, Fourth of July, Labor Day and the "Back to School" period, Thanksgiving and Christmas.

2. The test checks were departmentalized, that is, instead of showing an average or deficiency for *each store as a whole*, each department of each of the 36 stores was separately tabulated.

Field examiners of the Tax Commissioner of Ohio spent one month at appellant's Detroit headquarters studying books and records kept. Following this survey the machinery for a physical test check was set up in cooperation with appellant and with full agreement of appellant as to procedures and methods to be used. Appellant, *not* the Tax Commissioner of Ohio, suggested one week as a representative test check period. Appellant requested that the time be staggered and that all stores not to be checked at once. Appellant chose which dates and which stores would be test checked. All of appellant's records relating to sales exempt by character (e.g. seeds and candy) were accepted by the Tax Commissioner of Ohio and used in the audit. This is but a mere sampling of the cooperation and spirit shown by the Tax Commissioner in this audit. Even the effort taken to conduct this audit by store and departments within said stores and thereby avoid any inaccuracy to the taxpayer, shows duty guided by fairness. Records of any sort or nature that would satisfy legal

requirements were requested by the tax examiners—none were ever offered.

On the basis of the test checks so conducted and all other information available to him, the Tax Commissioner of Ohio issued the assessment in issue. The appellant duly filed a petition for reassessment pursuant to Section 5739.13, Ohio Revised Code, which grants to it an administrative hearing before the Tax Commissioner of Ohio and is a prerequisite to a judicial appeal. At this administrative hearing, the only information presented to the Tax Commissioner by the appellant was a composite test check of the various daily test checks of individual departments of individual stores in such a way as to total one week's operation of a single *imaginary* store. However, such composite check combined in each instance the *minimum* day of the *minimum* department of the *minimum* store. Such information, the only information submitted to the Tax Commissioner of Ohio by the appellant, was found not to be of any value and the assessment was affirmed in a journal entry issued by the Tax Commissioner of Ohio under date of February 21, 1958.

The appellant appealed, pursuant to Section 5717.02 Ohio Revised Code, to the Ohio Board of Tax Appeals, which is a quasi-judicial body having appellate jurisdiction over the Tax Commissioner of Ohio. The appellant contended before the Ohio Board of Tax Appeals: (1) that it had adequate records and that the sales tax assessment as such was not valid; (2) that the test check was not conducted during a representative period as required by law; and (3) that the Tax Commissioner did not apply other information as required by law.

At the hearing before the Ohio Board of Tax Appeals, which hearing lasted 4 days, the appellant introduced the testimony of 4 witnesses and numerous exhibits. The Tax

Commissioner of Ohio introduced the testimony of the two senior field examiners who conducted and supervised the test checks and audit. The Ohio Board of Tax Appeals ruled that the appellant did not maintain adequate records as required by law and that the test checks were validly conducted. The Ohio Board held that the appellant system of recording taxable sales was not susceptible of audit by the taxing officials to determine its correctness and while adequate for the appellant's purposes was not a fulfillment of the requirements of Ohio law. The Board of Tax Appeals further ruled that the evidence submitted by the appellant, while voluminous, was highly speculative and not of probative value. The Board held on the basis of the evidence submitted that the test check was conducted during a representative period as required by law and that the assessment as made was valid and lawful.

The appellant appealed directly to the Ohio Supreme Court which under Section 5717.04, Ohio Revised Code, is permissible in Ohio tax cases. The appellant in addition to the errors raised before the Ohio Board of Tax Appeals raised the contention that the decision of the Ohio Board of Tax Appeals was in violation of its rights guaranteed under Section 1 of the Fourteenth Amendment of the United States Constitution. The Tax Commissioner of Ohio raised the question of timeliness as to this issue inasmuch as it had not been raised before the Ohio Board of Tax Appeals. The Ohio Supreme Court specifically ruled that the issue of due process of law could be raised before it for the first time but that no violation of the due process of law clause had occurred. The Supreme Court after a consideration of all the evidence affirmed the decision of the Ohio Board of Tax Appeals.

II.

QUESTIONS PRESENTED

1. Was the appellant presented with an opportunity to raise the question of its constitutional rights guaranteed under Section 1 of the Fourteenth Amendment of the United States Constitution and did the Ohio Supreme Court rule on such constitutional question?

2. Was the Ohio Supreme Court correct in its ruling that there was no violation of the rights guaranteed to the appellant under the Fourteenth Amendment of the United States Constitution?

III.

DISCUSSION OF QUESTIONS PRESENTED

Before listing the questions presented, a comment must be made in answer to the alleged questions listed by appellant in its brief on pages 8-9. It is imperative that such allegations be answered since silence is to connote or clothe them with some respectability of fact. Three (3) questions listed by appellant Kresge are as follows:

1. Does Section 5739.10, Revised Code of Ohio, as construed and applied, deprive appellant of property without due process by establishing "*an arbitrary and irrebuttable presumption*" that a 6 day test check conducted to determine the percentage of appellant's taxable sales was representative of the assessment period?

2. Does the decision of the Ohio Supreme Court deprive appellant of property without due process for the reason that the Court *arbitrarily refused* to consider and give effect to the uncontradicted evidence of appellant that the 6-day test checks were not representative of the assessment period?

3. Does the decision of the Ohio Supreme Court deprive appellant of property without due process for the reason that the Court *arbitrarily refused* to give effect to that part of Section 5739.10, Revised Code of Ohio, which requires than when an assessment is made pursuant to a test check, "* * * other information relating to sales made by such vendor * * *" must be taken into consideration by the Tax Commissioner?

Question No. 1 alleges that an "arbitrary and irrebuttable presumption" has been established or set up. Neither the Tax Commissioner, the Board of Tax Appeals nor the Supreme Court of Ohio have ever stated, inferred or suggested a so-called "irrebuttable presumption" existed now or in the past. The Tax Commissioner's Order (Appendix I, pages 18-21 of appellant's brief) contains a detailed analysis into the appellant's objections and the Tax Commissioner's answers based upon the evidence presented by appellant. This order of the Tax Commissioner outlines the specific evidence offered and the detailed reasons as to why it was insufficient to change the more accurate figures produced by the test check and other information considered by the Tax Commissioner.

The Entry of the Board of Tax Appeals (Appendix II, pages 22-41 of appellant's brief) also supports the thinking of the Tax Commissioner, i.e., the evidence of appellant Kresge was insufficient to offset the percentages arrived at by test checks and insufficient to make any change in the presumption of taxation. Nowhere is there even a hint of "irrebuttable presumption."

The decision of the Supreme Court of Ohio (Appendix III; pages 41-47) again bears out the fallaciousness of appellant's positive assertion that there is an "irrebuttable presumption."

Question No. 2 alleges that the Ohio Supreme Court "arbitrarily refused" to consider and give effect to the "uncontradicted" evidence of appellant that the test checks were not representative. This charge infers that our state's high court closed its eyes to "uncontradicted evidence" by a flat refusal and thereby was not able to render the proper and just decision.

Has appellant itself ignored the fact that the Court had before it the record of testimony taken before the finder of facts, the Board of Tax Appeals? Also before the Court were all the exhibits and briefs of counsel. The Supreme Court's opinion details each objection of appellant (including this one) and answers each specifically. "Uncontroverted Evidence" alone is not enough—there must be relevancy and or materiality connecting the evidence with the issue at bar. This so-called "uncontroverted evidence" argument was at each stage of appeal laid at rest.

Question No. 3 alleges an issue of comparable caliber. However, this one charges "other information" was ignored by the Court. Every shred of information was considered and passed on by the Tax Commissioner, the Board of Tax Appeals and the Ohio Supreme Court. Their respective entries and opinions bear this out.

1. The appellant was presented with several opportunities to raise the question of its constitutional rights and further, the Supreme Court of Ohio specifically recognized the issue being raised and ruled upon same.

After the initial assessment was levied by the Tax Commissioner, the appellant-taxpayer had a right to petition for reassessment directed to the Tax Commissioner under Section 5739.13, Revised Code of Ohio. This, the appellant chose to do and a hearing was had where evidence was presented supporting appellant's position. Following this hearing and a final determination issuing from the Tax

Commissioner, the appellant was entitled to and did so choose a trial *de novo* before the Board of Tax Appeals pursuant to Section 5717.02, Revised Code of Ohio. A full and complete hearing was had that lasted four (4) days. A record was taken, exhibits offered, rules of evidence applied and the decision of the Tax Commissioner was affirmed in a lengthy detailed opinion.

Under Section 5717.04, Revised Code of Ohio, the appellant has a right to appeal directly to the Supreme Court of Ohio. Again the appellant chose to appeal. Under this statute, the Supreme Court of Ohio can reverse or modify a decision of the Board of Tax Appeals if upon the hearing and consideration of the "record" and "evidence" the Court finds the lower decision is unreasonable and unlawful. Statutory power of course is not required to give the high court power to reverse because of constitutionality of the taxing law or an infringement of the taxpayer's rights.

The Supreme Court of Ohio, as did the lower tribunals, did not deny appellant an opportunity to be heard, to offer evidence, or such.

The appellee-Tax Commissioner raised the issue of *timeliness* in the Ohio Supreme Court when the appellant taxpayer raised its constitutional questions. The Supreme Court of Ohio overruled this objection and gave its reasons not only in the opinion but made it a part of the syllabus, which is the law of the case in Ohio.

The Supreme Court of Ohio stated on page 406 of its opinion (Appendix IH, page 43 of appellant's brief):

> "The appellant questions the constitutionality of Section 5739.10, Revised Code, on the grounds that the appellant is deprived of its property without due process of law because of misconstruction and misapplication of the statutory provisions, and because

> an irrebuttable presumption of the validity of the tax checks is thereby created, all in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States."

The high court then answered this in paragraph 4 of its syllabus wherein it states:

> "4. Such provisions of Section 5739.10, Revised Code, are not violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting the taking of property without due process of law."

How then, can appellant here assert that it was deprived of the opportunity to raise the constitutional question in view of the quoted portions from the Court's findings? Appellee submits there is no basis for the allegation of "no opportunity" and its being raised here is done without foundation or reason.

2. The Ohio Supreme Court was correct in its ruling that there was no violation of the rights guaranteed to the appellant under the Fourteenth Amendment of the United States Constitution.

The appellant contends that its rights guaranteed under the Fourteenth Amendment of the United States Constitution were violated since the Ohio Supreme Court decreed an irrebuttable presumption of taxability against it. While Ohio in its Sales Tax Act does have a presumption of taxability, such is not and never has been an irrebuttable presumption.

The Ohio sales tax is an excise tax levied on each sale consummated in the State of Ohio. Section 5739.02, Ohio Revised Code. The sales tax is collected from the customer or consumer making the purchase and is collected by the retailer such as the appellant who at each 6 month period is required to return such money to the State of Ohio.

Since the retailers such as the appellant are in reality the mere collectors of the tax and not the payers, Ohio must safeguard the collection thereof. To do so, the General Assembly of Ohio has enacted the following statutory provisions:

> "Section 5739.01
>
> "
>
> "The tax collected by the vendor from the consumer under Sections 5739.01 to 5739.31, inclusive, of the Revised Code, is not part of the price, but is a tax collection for the benefit of the state, and except for the discount authorized in Section 5739.01 of the Revised Code, no person other than the state shall derive any benefit from the collection or payment of such tax.
>
> "Section 5739.02
>
> "
>
> "For the purpose of the proper administration of Sections 5739.01 to 5739.31, inclusive, of the Revised Code, and to prevent the evasion of the tax, it is presumed that all sales made in this state are subject to the tax until the contrary is established. "

As the Court can discern, such statutory provisions in no way create an irrebuttable presumption. *No* decision of the Ohio Supreme Court has held that an irrebuttable presumption exists. *No* decision of the Ohio Board of Tax Appeals has ever so ruled. The Board of Tax Appeals or the Court must consider all evidence submitted but if such lacks probative value, a decision affirming the Tax Commissioner is called for. This is exactly the situation here—insufficient evidence of probative value and not a case of an irrebuttable presumption.

A recent case decided by the Ohio Supreme Court best illustrates the error of the appellant's position. In the case of *Bronowicz v. Bowers*, 169 Ohio St., 193, the Tax Commissioner issued a sales tax assessment which was

subsequently modified by the Ohio Board of Tax Appeals. This case was appealed by the Tax Commissioner to the Ohio Supreme Court. Such Court affirmed the modification by the Board of Tax Appeals. If there ever was an irrebuttable presumption, the modification would have been a reversible error. Such was and is not the situation in Ohio. On this point, no constitutional rights of the appellant were violated.

The appellant further contends that its constitutional rights were violated because the Tax Commissioner failed to consider any other information besides the test checks in issuing the assessments. Section 5739.10, Ohio Revised Code, insofar as pertinent provides:

> "In addition to the tax levied in section 5739.02 of the Revised Code, and to secure the same objectives specified in such section, there is hereby levied upon the privilege of engaging in the business of making retail sales, an excise tax of three per cent of the receipts derived from all such retail sales, except retail sales under forty-one cents and those to which the excise tax imposed by section 5739.02 of the Revised Code is made inapplicable by division (B) of said section. For the purpose of this section no vendor shall be required to maintain records of individual retail sales of tangible personal property under forty-one cents, and no assessment shall be made against any vendor for retail sales of less than forty-one cents, solely because the vendor has no records of, or has inadequate records of, retail sales of less than forty-one cents; provided that where a vendor does not have adequate records of receipts from his retail sales in excess of forty cents, the tax commissioner may refuse to accept the vendor's return, and upon the basis of test checks of the vendor's business for a representative period, and other information relating to the sales made by such vendor, determine the proportion that taxable retail sales bear to all his retail sales."

This section of the Ohio Revised Code was enacted actually to insure a method for the collection of the sales tax in the event a retailer failed to maintain adequate records to establish whether or not the proper amount of the tax had been paid to the State of Ohio. The appellant here failed to maintain adequate records to establish if correct returns had been filed. The method of the test checks was the only avenue available to the Tax Commissioner. Concededly, the Tax Commissioner is to consider all information at his disposal in issuing the assessment. But the only information submitted to the Tax Commissioner by the appellant was this minimum test check store on which the appellant itself chose not to rely in any further proceeding. Actually, the record reveals that the Tax Commissioner considered all the information at his disposal. Simply because the evidence submitted to the Tax Commissioner was highly speculative and lacking in probative value does not mean that such information must have been relied on solely. This was in effect the ruling of the Ohio Board of Tax Appeals and the Ohio Supreme Court and is in no manner a violation of the appellant's constitutional rights. In fact this matter is strictly a question of interpretation and evaluation of the evidence presented at a tax trial. The fact that the Ohio Board of Tax Appeals and Ohio Supreme Court interpreted such evidence contrary to that submitted by the appellant raises no constitutional question nor does such constitute a violation of any constitutional rights.

IV.

CONCLUSION.

It is submitted that neither the constitution of the United States nor of Ohio have been violated; that appellant's rights, constitutional or otherwise, have in no way been transgressed; and further that the Supreme Court of Ohio, plus the lower tribunals in this cause, have in no way acted wrongly.

Respectfully submitted,

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